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IN THE

Supreme Court of the United States

October Term, 1969

No. 316

DIANA KEARNY POWELL,

Petitioner,

v.

NATIONAL SAVINGS AND TRUST COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NATIONAL SAVINGS AND TRUST COMPANY,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered April 9, 1969, in Appeal No. 22,223, *Powell v. National Savings and Trust Company.* (A-1).

OPINION BELOW

Judgment of the United States Court of Appeals for the District of Columbia Circuit, *Powell v. National Savings and Trust Company*, Appeal No. 22,223, rendered April 9, 1969, is without opinion, and is not yet reported. (A-1).

JURISDICTIONAL STATEMENT

Review is sought of a judgment of the United States Court of Appeals for the District of Columbia Circuit, entered April 9, 1969, affirming a judgment of the United States District Court for the District of Columbia, denying a Complaint for injunctive relief to restrain fraudulent conversion of real and personal property on the basis of rulings made pursuant to the misrepresentation, fraud, and collusion of the Defendant-Appellee.

This Court has jurisdiction under 28 U.S.C. 1254(1) and under the Constitution of the United States, Amendment 1, insofar as it relates to the right of petition for redress of grievances, and Amendments 4, 5, and 9, insofar as they relate to rights against unlawful seizure of property.

QUESTIONS PRESENTED

Questions presented for review, including subsidiary questions comprised therein, are:

1. Whether the United States Court of Appeals denied Petitioner rights of due process and against unlawful seizure of property, guaranteed by Amendments 4, 5, and 9 of the Constitution of the United States, by affirming, without opinion or comment except reference to related cases, judgment of the District Court arbitrarily dismissing injunctive relief seeking to restrain conversion of real and personal property pursuant to a judgment shown to have been based on mistake of fact and law resulting

from misrepresentations made by Defendant-Appellee as to material facts, the wording of a will, and the wording of cited precedents, contrary to well-settled principles of law and to prior decisions of this Court.

2. Did the United States Court of Appeals deny Petitioner rights of petition preserved under Amendment One of the Constitution and basic rights to seek in the Courts redress of grievances upon the settled law, applied to the facts of record, by affirming a judgment of the District Court, after Petitioner had been prevented by the Court with threats of criminal contempt from presenting evidence of fraud and misrepresentation as grounds for injunctive relief.

CONSTITUTIONAL PROVISIONS

Constitution of the United States:

Amendment 1: Congress shall make no law . . . abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

. . .

Amendment 4: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

Amendment 5: No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

. . .

Amendment 9: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

STATEMENT OF THE CASE

Judgment without opinion was entered April 9, 1969, by the United States Court of Appeals for the District of Columbia Circuit, Appeal No. 22,223, *Powell v. National Savings and Trust Company* (A-1), affirming the judgment of the United States District Court for the District of Columbia denying Petitioner's Complaint for injunctive relief from fraudulent disposition of property, and listing cases cited by Respondent as grounds for dismissal as *res judicata*, which were the same decisions which Petitioner sought to show were obtained by the misrepresentations, fraud, and collusion of Respondent.

Plaintiff Diana Kearny Powell filed a Complaint for injunctive relief from fraudulent disposition of property, May 29, 1968, in violation of her rights under Amendments 4, 5, and 9 of the Constitution of the United States. Motion of Defendant, National Savings and Trust Company, to dismiss the Complaint on the ground of *res judicata* was filed June 12, 1968. Plaintiff, Miss Powell, on June 18, 1968, filed Opposition to the Motion to Dismiss, and Request for Admissions as to the genuineness of documents which were records in related cases, specifically, in *Powell v. Powell* (C.A. 4051-55), the Complaint by Lucy Powell for appointment of the National Savings and Trust Company as Successor Trustee, showing that title to the property had vested in William Glasgow Powell, the testamentary trustee, who had died, and showing that the Appellee Trust Company had accepted the successor Trusteeship, without contest. These documents showed that distribution of property proposed by the Defendant Trust Company, which Plaintiff, Miss Powell, sought to enjoin, was predicated upon claims to title in conflict with the title of the trustee, and were raised for the first time by the Appellee Trust Company, after termination of the trust. Defendant Trust Company objected to the Request for Admissions on the ground that the

record speaks for itself. Motion of Plaintiff, Miss Powell, to strike the Motion to Dismiss on grounds of *mala fides* was filed June 27, 1968. Hearing on the Motions before Judge Sirica on July 3, 1968, was resolved in favor of the Trust Company on all points (Order entered July 5, 1968) after the Court initiated the proceeding by warning Plaintiff (Miss Powell) that he would find her in contempt of Court and incarcerate her if she argued the fraud and misrepresentation which were the grounds stated in her Complaint (Tr. 1, 3). The Court further stated, after repeated interruptions of Plaintiff's arguments, the Court's personal opinion of a senior member of the law firm representing the Defendant Trust Company, who had never actively participated:

> "You know who John E. Powell is? He was a very fine member of our Bar, a very excellent lawyer. He used to be a member of the Grievance Committee. I don't think he is dishonest or anything at all. I don't think he'd represent a dishonest client" (Tr. 7).

Plaintiff's Motion to Reconsider and Set Aside the Judgment on grounds it violated property rights protected by Amendments 4, 5, and 9, and rights of petition under Amendment 1 of the Constitution of the United States, as well as Plaintiff's Objections to the form of Order as exceeding the ruling of the Court, submitted July 5, 1968, and entered on the docket July 12, 1968, were denied by Order of July 18, 1968. Notice of Appeal was filed July 12, 1968, and the case duly docketed in the United States Court of Appeals.

ARGUMENT

1. The Court of Appeals has deprived Petitioner of property rights secured under Amendments 4, 5, and 9 of the Constitution of the United States by denying injunctive relief from an Order predicated upon false statements of fact and law, and disposing of property in conflict with decisions of this Court.

The United States Court of Appeals for the District of Columbia Circuit, affirming the District Court's denial of injunctive relief, deprives Petitioner of real and personal property which is rightfully hers, in conflict with the protections of Amendments 4, 5, and 9 of the Constitution of the United States (p. 3). In so doing, it has decided in conflict with the decisions of this Court in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, and in *Ochoa v. Hernandez*, 230 U.S. 139, 57 L.Ed. 1427, 33 S. Ct. 1033. The *Dartmouth College* case, applying the clause preserving the inviolability of contracts, and *Ochoa v. Hernandez*, applying property rights preserved by Amendments 4 and 5 in circumstances closely analogous to the instant case, each hold, in unmistakable terms, that the Government, or any agency of it, may not take property belonging to one person and give it to someone else.

Petitioner has repeatedly shown in the cases cited by Respondent as supporting its motion to dismiss on grounds of *res judicata*, that these decisions were predicated upon misstatements of fact, clearly shown to be false, and misstatements of cited case law, reaching by sophistic reasoning the exact reverse of established precedents, cited in *Pyne v. Pyne*, 81 U.S. App. D. C. 11, 154 F.2d 297.

Reliance by Respondent on misstatements of fact by the Court induced by Respondent's own knowing misrepresentations is fraud and dishonesty. Good faith

requires that the Court exercise its supervisory powers over lower federal Courts to restrain use of the Court to perpetrate fraud and to order correction of plain error that violates rights preserved by the Constitution.

Injunctive relief is in accord with the settled principle that *res judicata* is not a defense to review of a decision based upon fraud and/or mistake. Petitioner cites *New Orleans v. Gaines (New Orleans v. Whitney)*, 138 U.S. 595, 34 L.Ed. 1102, 33 S. Ct. 428; *Welch v. Mandeville*, (U.S.) 1 Wheat. 233, 4 L.Ed. 79:

> . . . it is generally held that the principles of *res judicata* may not be invoked to sustain fraud, and that a judgment obtained by fraud or collusion may not be used as a basis for the application of the doctrine of *res judicata*.

The continuing efforts of Miss Powell to obtain judicial correction of this gross miscarriage of justice are evidence that she has not been negligent in presenting the facts, and the continuing fact of the fraud of the Defendant is plainly visible in its defense of *res judicata*. In *Bennett v. Commissioners of Internal Revenue*, 113 F.2d 837, 130 A.L.R. 369, the Court held:

> The rule of *res judicata* is that one who has permitted a final judgment to go against him is estopped by that judgment from contending elsewhere, against the parties to it and their privies, that the fact or issue is otherwise than as there adjudged.

2. The Court of Appeals, in sanctioning by affirmance the arbitrary procedure in the District Court in threatening to hold Petitioner in contempt if she presented fraud as grounds for injunctive relief departs from normal procedures and violates the right to petition the Courts protected by the First Amendment and common law.

The Court of Appeals, by affirming the judgment of the District Court, clearly entered on prejudice and not on the facts, in effect, sanctioned arbitrary and capricious procedures of the District Court in threatening to hold Petitioner in criminal contempt if she presented her grounds for injunctive relief, that is, the fraud and deception of the Respondent, as it plainly appears in the undisputed facts of record in related cases.[1]

> THE COURT:
> . . . I want you to understand one thing, I don't want you to call names, I don't want you to call people frauds, because if you get out of line, contemptuous, I will put you right in jail, is that clear to you?
>
> MISS POWELL:
> I understand that, Your Honor –

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[1] Prior related cases are *Powell v. Powell* (on appeal, *Powell v. National Savings and Trust Co.*), 111 U.S. App. D. C. 290, 296 F.2d 412, cert. den., 368 U.S. 946, 7 L.Ed. 2d 343, 82 S. Ct. 307, rehearing denied, 368 U.S. 1005, 7 L.Ed. 2d 547, 82 S. Ct. 597; *Powell v. National Savings and Trust Company*, 114 U.S. App. D. C. 269, 314 F.2d 274, cert. denied, 379 U.S. 920, rehearing denied, 379 U.S. 984; *Powell v. National Savings and Trust Company*, 384 U.S. 938, 384 U.S. 1027, 86 S. Ct. 1919; Administration No. 12,657, Estate of Diana Kearny Powell, widow, deceased (1905).

> THE COURT:
> Now just a minute, you listen to me. You have been litigating a long time on this matter and this is going to be your final chance in this court. If you do not obey the rulings of this court and stop talking when I tell you, I will consider citing you for contempt of court, is that clear to you? (Tr. 2-3)

Nothing appeared, or in fact existed, to warrant the threats, which themselves are prejudicial as suggesting improprieties and misconduct on the part of Miss Powell which did not exist. It is obvious that she is unable to present a case for relief from fraud without mentioning fraud and the persons she proposed to show were in collusion in perpetrating the fraud.

The Court openly admitted bias, and that the decision of the Court was the product of bias and favoritism, and not of sound judgment on the record. At one point, the Court interrupted argument by Miss Powell to state (Tr. 7):

> . . . You know who John E. Powell is? He was a fine member of our Bar, and a very excellent lawyer. He used to be a member of the Grievance Committee. I don't think he is dishonest or anything at all. I don't think he'd represent a dishonest client.

The sanctioning of such procedures is a clear violation of the most fundamental right – to petition the Court for redress of civil and criminal wrongs. It is of the essence of denial of freedom of speech and right of petition protected by Amendment 1 and included in the "rights preserved to the people" by Amendment 9, and is such a departure from orderly procedure as fully to warrant the special supervisory powers of this Court over lower federal Courts, both as to this case and as to the evidence it presents of collusion and fraud in related cases.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the judgment affirming the Judgment of the United States District Court dismissing the Complaint for injunctive relief from a judgment based on mistake, fraud and collusion.

Respectfully submitted,

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Petitioner, pro se

APPENDIX

[Filed April 9, 1969]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,223 September Term, 1969

DIANA KEARNY POWELL,
Appellant,

v. Civil Action 1307-68.

NATIONAL SAVINGS AND TRUST COMPANY,
Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Fahy, Senior Circuit Judge; Wright and Robinson, Circuit Judges.

JUDGMENT

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by appellant, *pro se*, and counsel for appellee.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the judgment of the District Court appealed from herein is affirmed. See *Powell v. National Savings & Trust Co.*, 111 U.S. App. D. C. 290, 296 F.2d 412, *cert. denied*, 368 U.S. 946 (1961), *rehearing denied*, 368 U.S. 1005 (1962); *Powell v. National Savings & Trust Co.*, 114 U.S. App. D. C. 269, 314 F.2d 274 (1963); *Powell v. National Savings & Trust Co.*, No. 17,658, decided November 19, 1963, *rehearing en banc denied*, January 15, 1964; *Powell v. National Savings &*

Trust Co., No. 18,292, decided May 19, 1964, *cert. denied*, 379 U.S. 920 (1964), *rehearing denied*, 379 U.S. 984 (1965); *Powell v. Paige*, 122 U.S. App. D. C. 397, 355 F.2d 108 (1965); *Powell v. National Savings & Trust Co.*, No. 19,782, decided March 11, 1966, *cert. denied*, 384 U.S. 938, *rehearing denied*, 384 U.S. 1027 (1966); *Powell v. National Savings & Trust Co.*, No. 20,967, decided October 23, 1967, *cert. denied*, 390 U.S. 957, *rehearing denied*, 390 U.S. 1037 (1968).

Per Curiam

For the Court:

Alexander L. Stevas
Chief Deputy Clerk

Dated: April 9, 1969.